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No. 07-582

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *ET AL.*

Petitioners,

v.

FOX TELEVISION STATIONS, INC., *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICUS CURIAE* TIME WARNER INC. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

The Order Here Cannot Survive Constitutional Scrutiny Because The First Amendment Generally Prohibits The Government From Regulating Speech Based On Its Content. 2

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) 6

Butler v. Michigan,
352 U.S. 380 (1957).....6

CBS v. DNC,
412 U.S. 94 (1973) 6

Community Television of Utah, Inc. v. Roy City,
555 F. Supp. 1164 (D. Utah 1982).....10

Denver Area Educ. Telecomms. Consortium, Inc. v. FCC,
518 U.S. 727 (1996).....3

FCC v. League of Women Voters of Cal.,
468 U.S. 364 (1984).....6

FCC v. Pacifica Found.,
438 U.S. 726 (1978).....4, 5, 6, 8

Miami Herald Publ'g Co. v. Tornillo,
418 U.S. 241 (1974).....3, 9

Red Lion Broad. Co. v. FCC,
395 U.S. 367 (1969).....6

Reno v. ACLU,
521 U.S. 844 (1997).....5, 6

Sable Commc'ns of Cal., Inc. v. FCC,
492 U.S. 115 (1989).....5, 6, 10

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994).....3, 5, 7

United States v. 12,200-ft. Reels of Super 8mm. Film, 413 U.S. 123 (1973).....6

United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000).....3, 4, 5, 6, 10

Statutes and Regulations

47 U.S.C. § 560 9

Other Authorities

Breaux Amendment to S. 2056, 108th Cong. (2004)..7

Children's Protection from Violent Programming Act, S. 161), 108th Cong. (2003) 7

Corn-Revere, Robert, *Can Broadcast Indecency Regulations Be Extended To Cable Television & Satellite Radio?*, 30 S. Ill. L.J. 243 (2006) 7, 9

In re Implementation of Section 551 of the Telecomm. Act of 1996 Video Programming Ratings, 14 F.C.C.R. 8232 (1998).....9

In re Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings, 13 F.C.C.R. 11248 (1998).....9

Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, S. 616, 109th Cong. (2005).....7

Open Forum on Decency before the S. Comm. on Commerce, Science and Transportation, 109th Cong. 10 (2005) 8

Pursuant to this Court's Rule 37.2, *amicus curiae* Time Warner Inc. respectfully files this brief in support of respondents.*

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Time Warner Inc. is a leading global media and entertainment company with businesses in cable television networks, cable systems, filmed entertainment, interactive services, and publishing media, including HBO, Turner Broadcasting System, Time Warner Cable, Warner Bros. Entertainment, America Online, and Time Inc. In light of these myriad speech-related endeavors, Time Warner has a substantial interest in cases like this one involving government efforts to restrict speech based on its content.

SUMMARY OF ARGUMENT

Time Warner fully supports respondents' constitutional arguments, which establish that the FCC's new policy on "fleeting expletives" violates the First Amendment as applied to broadcast speech. It follows *a fortiori* that such a policy would violate the First Amendment as applied to speech transmitted by other media, such as cable television, motion pictures, the Internet, or print media. This Court has recognized time and again that the Government

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* Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

may restrict the speech of non-broadcast media based on its content only in the most extraordinary circumstances, and a ban on vulgar or indecent expletives outside the broadcast context could not remotely pass strict First Amendment scrutiny.

The First Amendment, after all, is based on the principle that it is up to the people, not their Government, to make the choices about what speech to hear and not to hear. Whatever limitations on that principle have been recognized in the narrow context of broadcasting do not generally apply in other contexts, and this Court should not lose sight of that bedrock fact in this broadcasting case. Certainly, content-based restrictions on vulgar or indecent speech have no place in the context of cable television. The very strength of the cable medium lies in the remarkable variety of choices that it offers the public. The suggestion by some public officials, echoed by some of petitioners' *amici*, that content-based restrictions on vulgar or indecent speech should not only be upheld in the broadcast context, but extended to the cable context, cannot be squared with settled First Amendment doctrine.

ARGUMENT

The Order Here Cannot Survive Constitutional Scrutiny Because The First Amendment Generally Prohibits The Government From Regulating Speech Based On Its Content.

The Government's merits brief portrays this as a run-of-the-mill administrative law case in which a court overstepped its bounds vis-à-vis an administrative agency. *See* Gov't Br. 20-42. Indeed, the Government tries to sidestep the underlying constitutional issues altogether, and urges this Court

to "remand to allow the Court of Appeals to consider them in the first instance." *Id.* at 42. That attempt to airbrush the constitutional issues out of this case is disingenuous at best.

In a free society, the Government may not lightly restrict speech based on its content. Such restrictions undermine the bedrock First Amendment principle that the people have the right to choose the speech to which they wish to listen or in which they wish to engage, even if others deem that speech vulgar or indecent. *See, e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 826-27 (2000). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). The "freedom of speech" protected by the First Amendment, U.S. Const. amend. I, thus puts editorial decisions fundamentally in private, not public, hands. *See, e.g.*, *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). For this reason, "the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner*, 512 U.S. at 641.

As this Court has explained, government regulation of indecent speech is "the essence of content-based regulation." *Playboy*, 529 U.S. at 812. Given that "[t]he history of the law of free expression is one of vindication in cases involving speech that

many citizens may find shabby, offensive, or even ugly," speech deemed "vulgar" or "indecent" by some is nonetheless entitled to full First Amendment protection. *Id.* at 826; *see also FCC v. Pacifica Found.*, 438 U.S. 726, 761 (1978) (Powell, J., concurring in part and concurring in the judgment) (rejecting the notion that "indecent" speech is less valuable than other speech, because "[t]his is a judgment for each person to make, not one for the judges to impose upon him").

It is impossible (and unwise) to pretend that these constitutional issues are not implicated by this case. The administrative order under review is not standard agency fare; it is an FCC order that targets speech and only speech based solely on its allegedly indecent content. Indeed, in its petition for certiorari, the Government highlighted the court of appeals' treatment of the underlying constitutional issues. *See* Cert. Pet. 13-30. The very first reason the Government identified for granting the writ was that "the decision below conflicts with this Court's decision in *Pacifica*," *id.* at 16, on the theory that the Second Circuit expressed hostility to a contextual analysis, while *Pacifica* allows such an analysis, as a constitutional matter, *see id.* at 13-14, 15-19. Only after addressing that constitutional issue did the Government move into the standard administrative-law arguments to which it now retreats in its merits brief. *See id.* at 19-26. The Government then argued that the petition was important on the ground that the Second Circuit had placed the FCC in a box by allegedly precluding the agency from considering context on constitutional grounds, and thereby forcing the agency to impose an unconstitutional ban on any and all expletives. *See id.* at 26-30; *see also*

Cert. Reply Br. 2-3 ("[T]his is not an ordinary case. ... [T]he decision below is hardly a garden-variety or routine remand under the ... APA. ... [T]he decision of the court of appeals is predicated on a fundamentally erroneous legal analysis, an analysis that warrants review because it is in direct conflict with this Court's decision in *Pacifica*.") (internal quotation omitted). Having thus urged this Court to grant the petition by emphasizing the Second Circuit's constitutional analysis, the Government may not now suggest that this Court should decide the administrative law issues in a vacuum without regard to the underlying constitutional questions. As one of the Government's own *amici* puts it, the constitutional issues here "prove to be the proverbial 'elephant in the room.'" Br. of *Amicus* Nat'l Religious Broadcasters in Support of Petrs., at 22.

Respondents have well explained the constitutional infirmities in the order under review, and Time Warner will not repeat those arguments here. The point of this brief is to underscore the truly exceptional nature of the FCC's content-based regulation of speech, and to highlight that such regulation cannot pass First Amendment muster either in this case or in the non-broadcast context.

The general rule, as this Court has explained, is that content-based restrictions on protected speech (even if deemed vulgar or indecent) are subject to "strict scrutiny." *Playboy*, 529 U.S. at 814; *see also Reno v. ACLU*, 521 U.S. 844, 874 (1997); *Turner*, 512 U.S. at 642; *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Under that standard, a content-based restriction on speech is presumptively invalid unless the Government establishes that it is

"narrowly tailored to promote a compelling Government interest." *Playboy*, 529 U.S. at 813; *see also id.* at 816. If a less restrictive alternative would serve the Government's purpose, the Government must resort to that alternative. *See id.* at 813. That standard generally applies to all content-based restrictions on speech, regardless of the specific medium of communication. *See, e.g.*, *Playboy*, 529 U.S. at 814 (cable television); *Reno*, 521 U.S. at 874 (Internet); *Sable*, 492 U.S. at 126 (telephone); *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (print); *United States v. 12,200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973) (film); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (mails).

The notable exception to that general rule arises in the broadcasting context. Under rationales of spectrum scarcity and public ownership of the airwaves, this Court has allowed the Government far greater latitude to restrict the content of broadcast speech than other speech. *See, e.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 394 (1969); *CBS v. DNC*, 412 U.S. 94, 101 (1973); *Pacifica*, 438 U.S. at 748-49; *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 374-76 (1984). Even in the broadcasting context, however, the Government hardly has free rein to restrict speech based on its content; rather, it must "narrowly tailor" restrictions on broadcast speech "to further a substantial governmental interest." *League of Women Voters*, 468 U.S. at 380.

Whatever the merits of continuing to apply less stringent constitutional scrutiny to content-based restrictions on broadcast speech—an issue well beyond the scope of this *amicus* brief—the key point is that broadcasting currently stands alone in the

level of content-based regulation that is constitutionally permissible. Certainly, the Government's greater latitude to restrict broadcast speech provides no basis for restricting non-broadcast speech. Indeed, this Court has specifically rejected the Government's efforts to extend the more relaxed First Amendment scrutiny applicable to broadcast speech to non-broadcast speech, including cable television speech. *See Turner*, 512 U.S. at 637-41. But there is always a danger that reaffirming an analytical framework that allows content-based restrictions on broadcast speech legitimates the entire venture of content-based speech regulation, and emboldens those who seek to expand that venture beyond the broadcast realm.

These concerns are far from idle. In recent years, Congress has entertained a series of bills that would extend the FCC's power to restrict speech based on its content from broadcasting to cable television. *See, e.g.*, Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005, S. 616, 109th Cong. (2005); Breaux Amendment to S. 2056, 108th Cong. (2004); Children's Protection from Violent Programming Act, S. 161, 108th Cong. (2003); *see generally* Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended To Cable Television & Satellite Radio?*, 30 S. Ill. L.J. 243, 256 (2006). These indecency measures are "popular with policymakers (if not with the audience members who pay a premium to subscribe to non-broadcast media)," *id.* at 257, and Members of the FCC at various times have expressed an interest in obtaining the authority to regulate the content of cable television speech as well as broadcast television speech, *see, e.g.*, Open Forum on Decency

before the S. Comm. on Commerce, Science and Transportation, 109th Cong. 10 (2005) (statement of FCC Chairman Kevin Martin) ("You can always turn the television off, and of course, block the channels you don't want … but why should you have to?"); *id.* at 11 ("[B]asic indecency and profanity restrictions may be a viable alternative that should be considered" in the context of cable and satellite television).

To be sure, in an era when many Americans receive their broadcast television stations via cable, it may seem odd at first blush to apply a different First Amendment standard to cable television speech than to broadcast television speech. Indeed, some of the Government's *amici* in this very case take this position. "Under the law, either the home is a special place or it isn't; and if is [*sic*] special, an intruding pig is still an intruding pig regardless of whether it travels by air or wire." Br. of *Amicus* Morality in Media, Inc. in Support of Petrs., at 34.

That approach, however, turns the law upside down. If anything, as respondents explain, technological developments raise doubt that the lesser First Amendment protection historically afforded to broadcast speech is appropriate today. *See* Br. of Resp'ts NBC Universal, Inc. *et al.*, at 32-38; Br. of Resp't Fox Television Stations, Inc., at 43-45. Certainly, such developments do not call into question the robust First Amendment protection afforded to non-broadcast speech. As one commentator has noted, "as blocking technology exists for broadcasting as well [as cable television and subscription media], the better question is whether *Pacifica* is still good law even as applied to

broadcasting, not whether it should be extended to other media." Corn-Revere, *supra*, at 256. This Court should never lose its vigilance to prevent restrictions on broadcast speech from spawning copycat restrictions on non-broadcast speech. *See, e.g.*, *Tornillo*, 418 U.S. at 258 (striking down fairness doctrine, which had been upheld in the broadcast context, as applied to newspapers).

Indeed, the cable television industry has worked closely with community leaders and Congress to adopt voluntary programs to give viewers greater control over what appears on their television screens. More than a decade ago, the entire television industry developed a voluntary ratings system to provide viewers with timely information about the nature of upcoming programming. The FCC approved this voluntary system in 1998, and declined to develop and impose its own alternative system. *See In re Implementation of Section 551 of the Telecomm. Act of 1996 Video Programming Ratings*, 14 F.C.C.R. 8232 (1998). This system now serves as the foundation for the V-Chip, a device found in every 13-inch or larger television manufactured after July 1999, which enables parents "to block the display of violent, sexual, or other programming they believe is harmful to their children." *See In re Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings*, 13 F.C.C.R. 11248 (1998). Cable companies also provide, free of charge, "lock boxes" or alternative methods of blocking the video and audio signals of any channel selected by the customer. *See* 47 U.S.C. § 560. In light of the tools available to allow viewers to choose what cable speech to hear and not to hear, the Government

cannot possibly establish that content-based restrictions on such speech pass First Amendment muster. *See, e.g.*, *Playboy*, 529 U.S. at 815 ("Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.").

Nor does the fact that some have characterized cable television as pervasive, and accessible by children, justify content-based indecency regulation in this context. Books, magazines, and the Internet are also pervasive in our society, and also accessible by children, but that does not justify content-based indecency regulation. *See, e.g., Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1169-70 (D. Utah 1982). The Government cannot, in the name of shielding children, abridge the speech of adults by reducing it to a level appropriate for children. *See, e.g.*, *Sable*, 492 U.S. at 128. However well-motivated indecency regulations may be with respect to protecting children, the burden of such regulations on the speech of adults cannot possibly be dismissed as merely "incidental[]." Br. of *Amicus* Morality in Media, Inc., at 36, 37. At issue here are direct content-based restrictions on speech *by* adults *for* adults.

Indeed, the notion that indecency regulations are generally permissible as long as they are motivated by a desire to protect children, *see id.* at 37-38, would essentially render the First Amendment toothless. Legislators, like other human beings, rarely act from a single motive or purpose, and their motivations or purposes are often impossible objectively to discern. A professed desire to protect children from certain

speech may reflect nothing more than an adult's dislike of that speech. Certainly, a professed motivation to protect children cannot possibly create a "safe harbor" for censorship. This Court has never embraced such an approach in two hundred years of this Nation's history, and should not embrace it now.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Respectfully submitted,

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